No. . . . . .

76-1639

In the

Supreme Court of the United States

HARRY J. RAMSEY,

Petitioner,

VERSUS

M/V MODOC and THE RIVER LINES, INC.,

Respondents,

CHARLES J. PISANO,

Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals
for the Fifth Circuit

Harry J. Ramsey
Appearing Pro Se
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New Orleans, LA 70130

I N D E X

TABLE OF AUTHORITIES

I.

CASES

II.

STATUTES

III.

OTHER AUTHORITIES

Petitioner, Harry J. Ramsey, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, No. 74-4197, entered in the above entitled case on January 31, 1977.

I.

REPORTS OF THE OPINIONS OF THE COURTS BELOW

The opinion of the United States Court of Appeals, printed in Appendix "A," infra, page A-1, has not been published officially, being a per curiam affirmation of the memorandum opinion of Honorable Alvin B. Rubin, Judge, United States District Court for the Eastern District of Louisiana, Civil Action No. 71-1910, printed in Appendix "B," infra, page A-2, and reported officially at 372 F. 2d 1131 (E.D. La. 1974).

II.

GROUNDS ON WHICH JURISDICTION IS INVOKED

The judgment of the United States Court of Appeals for the Fifth Circuit was rendered and entered on January 31, 1977. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254, and U.S. Sup. Ct. Rule 19(b), 28 U.S.C., providing that this Court may review the decision of a United States Court of Appeals where the decision involves an important question of federal law which has not been, but should be, settled by this Court, or where the decision of a federal question in some way conflicts with applicable decisions of this Court.

III.

QUESTIONS PRESENTED

A. Whether a master of a vessel making foreign vogages or voyages from a port on the Atlantic to a port on the Pacific enjoys the status of "seaman" as comtemplated by 46 U.S.C., Section 596, and is therefore entitled to recover from the vessel's owner penalty wages, as therein provided, where the owner fails to pay to the master his wages within four days of the master's discharge from the vessel?

B. Whether the penalty wages referred to in 46 U.S.C., Section 596, can be assessed against the owner of the vessel where during the four day period immediately following the master's discharge the owner had sufficient cause to withhold the master's wages, but where

the owner did not have sufficient cause thereafter, yet continued to withhold such wages?

IV.

STATUTE INVOLVED

The statute involved in this petition is 46 U.S.C., Section 596, which reads as follows:

> "The master or owner of any vessel making coasting voyages shall to every seaman his wages within two days after the termination of the agreement under which he was shipped, or at the time such seaman is discharged, whichever first happens; and in case of vessels making foreign voyages, or from a port on the Atlantic to a port on the Pacific, or vice versa, within twenty four hours after the cargo has been discharged, or within four days after the seaman has been discharged, whichever first happens; and in all cases the seaman shall be entitled to be paid at the time of his discharge on account of wages a sum equal to one-third part of the balance due him. Every

> master or owner who refuses or neglects to make payment in the manner hereinbefore mentioned without sufficient cause shall pay to the seaman a sum equal to two days' pay for each and every day during which payment is delayed beyond the respective periods, which sum shall be recoverable as wages in any claim made before the court; but this section shall not apply to masters or owners of any vessel the seamen of which are entitled to share in the profits of the cruise or voyage. This section shall not apply to fishing or whaling vessels or yachts."

V.

STATEMENT OF THE CASE

A. The Nature of the Proceedings.

Petitioner brought suit in the United States District Court for the Eastern District of Louisiana against M/V Modoc and the River Lines, Inc., the vessel's owner, seeking wages, damages for personal injuries suffered due to the

unseaworthiness of the vessel and the negligence of the owner, and praying that he be awarded penalty wages as described in 46 U.S.C., Section 596, for the owner's unjustified failure and refusal to pay his wages. The jurisdiction of the District Court was invoked under 28 U.S.C., Section 1331.

After three and one-half days of trial, the jury returned a verdict awarding to petitioner back wages and damages for personal injuries suffered due to the unseaworthiness of M/V Modoc and the negligence of the River Lines, Inc. The District Court granted the River Lines, Inc.'s motion for a new trial, and denied petitioner's request that judgment for penalty wages be entered under 46 U.S.C., Section 596, in accordance with the jury's finding by special interrogatories that the River

Lines, Inc., had withheld petitioner's wages without sufficient cause.

At the new trial, the jury failed to find that the vessel had been unseaworthy or that the owner had been negligent; and the Court directed verdict against petitioner on the penalty wage issue, stating in its opinion, at 1133, that "[u]nder the penalty wage statute, 46 U.S.C. §596, only seamen can claim the penalty; [petitioner] was hired as a master, and he remained a master so long as he was performing services for the vessel."

In dicta, the Court added that even were petitioner a seaman in the context of 46 U.S.C., Section 596, he could not recover penalty wages without showing that the River Lines, Inc.'s arbitrary and unreasonable failure to pay occurred within the applicable statutory

period. At 1134, the Court wrote:

> "To support any recovery, the jury needed to decide as a preliminary matter whether petitioner's discharge of the ship's discharge of cargo occurred first, in order to determine whether the twenty-four hour or the four day period should apply. Then the jury had to determine that River Lines failure to pay wages within the applicable period was without sufficient cause during that same period; [McCrea v. United States, 294 U.S. 23 (1935)] holds that an owner's behavior, even it later became arbitrary or unreasonable, does not make him liable for a penalty if sufficient cause to withhold wages was present during the statutory period."

Petitioner appealed to the United States Court of Appeals for the Fifth Circuit, where the District Court's judgment was affirmed (Appendix "A," page A-2).

B. The Relevant Facts.

In June, 1970, the River Lines, Inc., hired petitioner to serve as master upon M/V Modoc, its new vessel, on its

maiden voyage from the Mississippi River, through the Panama Canal, to San Francisco Bay. Aboard was a crew of seven river and harbor seamen, five of whom had previously been employees of the River Lines, Inc. Articles were signed in New Orleans on June 28, 1970.

When the vessel reached the Canal Zone, a member or members of the crew contacted by telephone the president of the River Lines, Inc., and objected to the course which petitioner set. The president urged the crew to continue.

On July 13, 1970, when the vessel was off the Pacific Coast near the Mexican Bay of Tehuantepec, the chief mate refused to obey petitioner's orders, causing petitioner to place the chief mate under arrest. Shortly thereafter, members of the crew overpowered

and deposed petitioner and handcuffed him to a fixture in the master's quarters. When the vessel put in to Acapulco, petitioner was discharged from the vessel. As petitioner was penniless and injured, he then attempted to contact by telephone the presdent of the River Lines, Inc.; the president refused to accept the call and otherwise willfully failed to provide petitioner with transportation to the United States, wages, or maintenance and cure.

VI.

REASONS FOR GRANTING THE WRIT

A. In affirming the decision of the District Court, the Court of Appeals has misconstrued 46 U.S.C., Section 596.

B. The issues here presented have great importance and far-reaching

effect.

In its construction of 46 U.S.C., Section 596, the Court of Appeals held that the master of a vessel is not a seaman within the purview of the penalty provisions set forth therein, and that the penalty provisions will only be triggered if the allegedly arbitrary and unreasonable failure to pay wages arose within four days' of petitioner's discharge from the vessel. This construction is in dramatic conflict with congressional will and an earlier decision of the United States Court of Appeals for the Fourth Circuit.

Petitioner would first address himself to the issue of the master's status in the context of the Penalty Wage Statute. The statute in question, 46 U.S.C. § 596, states that "The master

or owner . . . shall pay to every seaman . . ." his wages timely, failing which penalty wages became due. Use of the disjuctive "or" implies that either one can be held responsible for such payment, not both. Logic dictates that whichever one is able to pay should be the one obligated to pay the wages, and penalty wages when due.

The maritime law recognized that "ability to pay" as the prime factor in deciding seaman wage claims. For example, in days of old the master had the obligation to pay in ports away from home because he controlled the freight receipts collected and thereby had the ability to pay the wages. See Norris, The Law of Seamen, §596 at p. 639 (3rd Ed. 1970). In modern days, the owner or its agent pays the wages when the crew signs off articles in the presence of a

U.S. Shipping Commissioner. In such cases the owner has the ability to pay. On the other hand, if the owner is bankrupt there is no "ability to pay" and the owner is not liable for penalty wages, the crew having only a lien against the vessel for payment of their earned wages. See Patterson v. S. S. WAHCONDAH, 235 F. Supp. 698 (E.D. La. 1964).

Here there is not doubt but that at the time the wages became due, petitioner did not have the ability to pay himself his own wages, much less pay the crew their wages. The owner, however, did have the ability to pay all of these wages, and in fact paid everyone except petitioner, who with or without a command was still a "seaman" as defined by Congress:

> "In the construction of title 53 of the Revised Statutes,

every person having the command of any vessel belonging to any citizen of the United States shall be deemed to be the 'master' thereof; and every person (apprentices excepted) who shall be employed or engaged to serve in any capacity on board the same shall be deemed and taken to be a 'seaman'; and the term 'vessel' shall be understood to comprehend every description of vessel navigating on any sea or channel, lake or river, to which the provisions of such title may be applicable, and the term 'owner' shall be taken and understood to comprehend all the several persons, if more than one, to whom the vessel shall belong." (Emphasis added) 46 U.S.C. § 713.

It should be noted that only apprentices and not masters were excluded in the definition of "seamen." The "master" is defined therein as the person having "command" of the vessel, which is de facto one of the "capacities" aboard the vessel. Hence, a master is a seaman having command, and an owner having an ability to pay but refusing

to do so would be refusing to pay a seaman his wages, especially since that "seaman-then-out-of-command" had no ability to pay himself the wages.

Moreover, the legislative purpose supporting the penalty wage provision, discussed further later herein, is to prevent exactly what happened here: The still delayed payment of earned wages, the impecuniousness of petitioner, and the possibly implied coersion or pressure to release his claim for damages. The master of a vessel is still a seaman within the meaning of the seaman wage statutes. See Nessen Transportation Co. v. Larsen, 7 N.E. 2d 765 (Ill. App. 1937). The fact that a seaman has command of the vessel doesn't make him not a seaman - it makes him more a seaman, just as the Chief Justice is still a judge.

The question of seaman's wages is steeped in Maritime Tradition. Originally, the seaman was to look to his "master or commander" for the payment of his wages, Acts July 20, 1790, c. 29, §6, 1 Stat. 133. The historical basis of placing the responsibility on the "master or owner" was the result of many factors.

One factor is discussed in Norris, The Law of Seamen, §536 at p. 639 (3rd Ed. 1970):

> "In maritime law the master is personally liable for the wages of seaman under his command. The right is predicated not only on the basis of an express contract, but because in the early days the master had control of the ship's earnings through his collection of freight monies."

Another factor for the ancient lodging of the master's responsibility to pay seamen their wages was that communications between the master and

the owner at distant ports were practically non-existant, if not impossible. Therefore, someone had to be given authority to act in place of the owner and pay the members of the crew. Furthermore, owners did not always have agents at every port where their ships were going to call, and communications between owner and agent were not as sophisticated or instantaneous as they are today.

Traditionally, the master had acted as the agent and representative of the owner in matters concerning the vessel. He was to sign the members of the crew to articles, stand in place of the owners before the courts in seamen's wage disputes, and ensure that proper provisions were carried aboard the vessel. Acts July 20, 1790, c. 29, §§1, 6, 8, and 9. In effect, the master of

the vessel acted as the alter ego of the owner because of the distance between owner and vessel and the lack of modern, instantaneous communications to maintain the day to day operation of the vessel.

Congress has from time to time recognized the realities of shipping and provided for various measures so as to accomodate the changing circumstances. A review of various amendments to the "Seamen's Acts" discloses Congress' manifestations of change. In Acts June 7, 1872, c. 322, the master was still accountable as an agent of the owner to ensure that the operation of the vessel was done properly, and if not, a fine was imposed on him. However, it should be noted that during the interim between 1790 and 1872, communication had greatly improved (telegraph, for example), and Congress saw fit to change "master or

commander" to "master or owner."

The courts have recognized the impact of communications on Maritime Law, as is shown in Petition of Den Norske Amerikalinje A/S, 276 F. Supp. 163 (N.D. Ohio, 1967) at p. 181:

> "Many Maritime laws were built on the theory that, in time of danger, contact between sea and shore was physically not possible . . . The captain of a sailing vessel in the South Pacific couldn't telephone his Owner's Office in London, or his fleet commander in Oslo. But now communication is faster from ship to shore than an ordinary long-distance call."

Times have changed since 1790, and Congress and the Courts have adapted to those changes. As Congress noted in 1968 with regards to seaman wages, the master of a vessel is no better off than the other men working aboard the vessel, and should be statutorily treated the same, especially when the owner can make

all the decisions and arrangements in practically an instant by radio, cable or telephone.

Thus, a realistic interpretation of §596 would be that a master would be obligated to pay wages to other members of the crew when the master has the ability to pay those wages, but the owner would be obligated to pay wages to all of the crew, including the master (deposed or in fact) when the owner has the ability to pay. Any interpretation excluding the master from receiving wages pursuant to §596 would, we submit, ignore the definition of "seaman," ignore the 1968 intent of Congress, ignore the speed of modern communications and ignore the realities of a situation where the master is not better off than the other members of the crew when it comes to receipt of his

earned wages. Here River Lines, Inc. admitted not paying petitioner his earned wages, and the jury found they were still owed, and further found there was no legally valid reason for the River Lines, Inc.'s failure to pay those wages. Consequently there seems no reason to conclude that petitioner should not get penalty wages when any other member of the crew would get them, particularly when the circumstances for payment and the ability to pay would be identical, other than at one time petitioner was the seaman in command of the M/V MODOC.

One of the strongest traditions of the sea is that of the priority given the seaman for his wages. It has often been said to be "so sacred and indelible that it adheres to the last plank of the ship." Congress, following the traditions of the sea, codified them into

what are now called collectively the "Seamen's Acts," 46 U.S.C. §541 et seq. The basic purpose "was to improve the surroundings and conditions of American seamen." Ladzinski v. Sperling Steamship and Trading Corp., 300 F. Supp. 947, 954 (S.D.N.Y., 1969). The Court, in Ladzinski, further stated that, "Section 596 in particular was intended to provide for the prompt payment of wages to a discharged seaman."

Therefore, an investigation must be undertaken to see who is a seaman. 46 U.S.C. § 713 is the definition section of the "Seamen's Acts" which applies, according to the "Historical Note," to:

> "For distribution of title 53, Sections 4501-4612, of the Revised Statutes referred to in the text, of which this § is part see note under Section 543 of this title."

The note referred to, states:

> "Title 53 of the Revised Statutes referred to in the text, was comprised of Sections 4501-4612 of the Revised Statutes and is now contained in Sections 542a, 543, 545, 546, 561, 562, 564-571, 574-578, 591-597, 600, 660, 661-669, 674-679, 682-685, 701-703, 705-707, 709, 710 and 711-713, of this title. (46 U.S.C.A. 543) (Emphasis ours)."

§713 contains the following definitions of "master" and "seaman" which are to be used as enumerated above in the "Seamen's Acts."

> ". . . every person having the command of any vessel belonging to any citizen of the United States shall be deemed to be the 'master' thereof and every person (apprentices excepted) who shall be employed or engaged to serve in any capacity on board the same shall be deemed and taken to be a 'seaman'; . ."

The master of a vessel is a seaman even when he has command.

In Warner v. Goltra, 293 U.S. 155, 55 S. Ct. 46 (1934), the Supreme Court extended to the master of a tug

coverage as a seaman under the Jones Act, 46 U.S.C. §688. A master is a seaman under the Jones Act. It is relevant at this point to note the editorial embellishment included after the headnotes in the Supreme Court Reporter, it states:

> "A 'seaman' in a broad sense is a mariner of any degree who lives his life on the sea, and it is enough that what he does affects operation and welfare of the ship when she is on a voyage, and in a narrow sense the term is limited to one who is an ordinary seaman and nothing more, a seaman as opposed to the master or an officer though the word 'seaman' once meant a person who could hand, reef, and steer, a mariner in the true sense of the word, but as the necessities of ships increased so the word 'seaman' enlarged its meaning." (Emphasis ours)

Even though the Court there noted that there may be some basis for wage discrimination between a "master" and "seaman," the Court's actual holding was that when the master and the seaman are "in the

same boat," then the term seaman included the term master.

Congress has also recognized the realities of shipping today. It was formerly presupposed that the master had a financial interest in the vessel upon which he was sailing, or that he had a close relationship with the owner. However, Senate Report No. 1079, dated April 5, 1968, on P.L. 90-293 which amended 46 U.S.C.§§ 600, 601, and 604 in 1968, recognized the change wherein it stated:

> "Today, however, the role of the master as a participant in the financial aspects of a voyage is, in the vast majority of instances, no different from that of any other member of the crew."

Here petitioner was in no better position than the rest of the crew as to wages, so there should be no distinction under §596.

The amendments to the above stated statutes give the master a lien on the vessel for his wages and disbursements, and place the master on a "parity" with all other members of the crew. The Senate Report states that the master "would be placed in the same position as any other seaman with regard to protection against . . . deprivation or any remedy for recovery of wages." This is an explicit indication of legilative intent to accord modern-day masters the same statutory rights and remedies as other seamen with regards to payment of their wages.

The importance of the reference to the amendments including the master within the lien provisions of the "Seamen's Acts" is readily apparent in reviewing cases denying the master the remedy provided in 46 U.S.C. § 596. In a

case pre-dating the 1968 amendments, Kennerson v. Jane R., Inc., 274 F. Supp. 28 (S.D. Tex. 1967), the Court stated, "The master of a vessel has no lien on the vessel for his wages," and then denied him penalty wages under §596. A similar line of deductive reasoning was stated in Payne v. SS Tropic Breeze, 423 F. 2d 236 (1 Cir. 1970) a case which overturned a lower court finding recognizing a foreign master's wage claim, the appellate court's reasoning being that the master's pre-1968 wage claim would not prime a valid ship mortgage because the master had no statutory lien. The Court therefore refused to interpret the term seaman in the ship Mortgage Act to include a master, an interpretation which would today be exactly the opposite in light of the 1968 amendments, assuming it involved an American vessel.

"Juxtaposed to the treatment of ordinary seaman is that of the master. As early as 1828 it was regarded as settled that the master had no lien against the vessel for his wages. Our attention has been called to no contrary holding in the intervening years. It was not until 1968 that Congress, after recognizing the ancient rule, enacted legislation giving master of American vessels liens for wages of the same rank and priority as seaman's wage liens. 24

"In view of this history, it is unlikely that the phrase in question, the Ship Mortgage Act was intended to include masters. Nothing was to be accomplished by such use of the term, as masters did not have maritime liens upon which the statute could operate. There inclusion would have been meaningless."
423 F. 2d at 242-243.

In footnote 24, the Court states:

"24. 46 U.S.C. §§ 600-601, 606-608 (Supp. IV, 1968). The statute, even if retroactive, would not be helpful here, as it applies only to masters of American vessels."
423 F. 2d. 243.

In reviewing the cases cited under 46 U.S.C. §596, it should be noted that without exception they were all concerned with claims for pre-1968 wages. Now that Congress has created lien for a master's wages, and indicated in the legislative history that a master is to be placed in the same position as any other seaman for recovery of wages, when there is no conflict between the master and the other seaman, the term seaman should be interpreted to include the master. Otherwise, it would be ridiculous to legally require the master to pay himself when he has neither a financial interest in the vessel nor a close relationship with the owner. The present statute, §596, makes allowances to prevent such a ridiculous result with the disjunctive "or" by stating the "master or owner shall pay."

Looking to the interpretation of the statute, §596 has often been considered remedial in nature, and as such is granted liberal construction. It has also, however, been called penal with an accompanying strict interpretation. Ladzinski, supra, citing many cases pro and con, 1011 (1951), and Petterson v. United States, 274 Fed. 1000, 1003 (S.D.N.Y. 1921). The Court in Ladzinski, after a discussion of both sides, stated at 955:

> "Regardless of the characterizations of §596 as remedial or penal, that provision must be construed so as to effectuate the legislative purpose of ameliorating the specific injustices that the Congress sought to eliminate."

The purpose for which Congress enacted §596 was stated at 954, as follows:

> "The basic purpose of the Seamen's Acts, 46 U.S.C. §541 et seq. was to improve

> the surrounding and condition of American Seamen. Committee on the Merchant Marine and Fisheries, H. R. Rep. No. 1657, 55th Cong., 2d Sess. 1-3 (1898). Section 596 in particular was intended to provide for the prompt payment of wages to a discharged seaman, id, at 3; See Collie vs. Fergusson, 281 U.S. 52, 50 S. Ct. 189, 74 L. Ed. 696 (1930), to insure that he would not be turned ashore with little or no money in his pocket. See Malanos v. Chandris, 181 F. Supp. 189 (N.D.N.Y. 1959). Because of his employers, see Underwood v. Isbrandtsen Co., Inc., 100 F. Supp. 863, 865 (S.D.N.Y. 1951), who might pressure him to release claims by withholding sums to which he was indisputably entitled. See e.g., Príndes v. the S.S. African Pilgrim, 266 F. 2d 125, 128 (9 Cir. 1959); Hume v. Moore-McCormack Lines, 121 F. 2d 336 (2 Cir. 1941). The primary objective of 596 is to prevent such coercion by deterring a shipowner or master from improperly making a deduction from a seaman's wages. See Swain v. Isthmian Lines, Inc., 360 F. 2d 81 (3 Cir. 1966)." 300 F. Supp. at 954.

Here was a classic example of River Lines trying to do exactly what Congress wanted

to avoid; petitioner was in necessitous circumstances and needed his wages, but River Lines refused to pay, setting itself up as judge and jury. Now that the proper jury has spoken, River Lines should be made to shoulder all of the obligations imposed by law.

By reviewing the entire picture of seaman's wages in light of the traditions of the sea, the purposes of the wage and lien statutes, the amendments thereto with accompanying legislative intent and acknowledgements of contemporary realities of shipping, and last by the expressions of the courts, the master of a vessel should be entitled to the provisions of 46 U.S.C. § 596.

Petitioner maintains further that the Court of Appeals was in error

in following the District Court's decision regarding the time period during which the arbitrary or unreasonable refusal to pay the seaman's wages must arise in order to activate the penalty provision of 46 U.S.C., § 596. The decision of the trial court was premised upon the assumption that, in order for a seaman to recover penalty wages under §596, the shipowner's unreasonable refusal to pay must occur within the statutory four day period from the date of the seaman's discharge. Under this interpretation, if a shipowner's initial withholding of wages can be justified to any degree, the seaman is precluded from recovery even if the shipowner's continued delay in payment is clearly arbitrary, unreasonable, and unjustified. Such a tortured construction subverts the plain language and obvious intent of

the statute. River Lines, Inc.'s sole authority, in according the statute such a narrow interpretation, rests upon the decision in McCrea v. United States, 294 U.S. 23, 55 S. Ct. 291, 79 L. Ed. 735, reargument denied 294 U.S. 382, 55 S. Ct. 443, 79 L. Ed. 933 (1935). Such reliance is misplaced.

In McCrea, the Courts denied recovery of double wages by a seaman who, after demanding his wages, failed to keep an appointment with the master and departed to land leaving an address before expiration of the legal time for payment of wages. The McCrea Court predicated its rejection of the petitioner's demand for penalty wages on the seaman's own misconduct, stating, "But it [the statute] affords no basis for recovery if, by his own conduct, he precludes compliance with it by the

master or owner." 55 S. Ct. 295 (Emphasis supplied). This distinction was recognized in Southern Cross Steamship Company v. Firipis, 285 F. 2d 651 (4th Cir. 1960), in which the Courts held that a shipowner, who had erroneously assumed that a seaman's wages had been paid in full, was no longer justified in such an assumption after the seaman had testified to the contrary. The Court awarded penalty wages from the date of the seaman's testimony.

In disposing of the defendant's reliance on McCrea, the Southern Cross Steamship Company Court declared:

> "As previously mentioned, in the present case, contrary to McCrea, there was no finding of excuse or justification within the period during which wages should have been paid. Moreover, even if there had been facts indicating some justification for withholding wages for a time, there is no suggestion that any conduct of

the seaman contributed to the delay . . ."

"Certainly, McCrea v. United States, supra, holds that where some fault of the seaman furnishes justification for the initial failure to pay wages at the prescribed time, the shipowner is not to be held to the double wage liability even if the excuse for non-payment later becomes inapplicable. Moreover, the Supreme Court's opinion in McCrea indicates that even if facts other than the seaman's conduct constitute a legally sufficient excuse for non-payment of wages at the time prescribed in the statute, normally no double wages will be imposed for a later period after the excuse ceases to exist. However, we do not think that the rule laid down in McCrea is as far-reachirg as the shipowner's contention in the instant case. Fact situtations may arise where the District Court finds the shipowner's conduct sufficiently inexcusable to render him liable for double wage penalties. However, equities not amounting to justification may be found to have existed when the wages fell due and which later became inapplicable. The District Court may in such circumstances properly postpone the running of double wages, confining

them to the period after any equity supporting the ship-owner's action has disappeared."

In the case at bar, River Lines, Inc. can hardly contend that their initial failure to pay petitioner's wages was due to any fault on his part, as petitioner was chained to a fixture in his cabin at the time.

In relying on McCrea, River Lines, Inc. has chosen to overlook the long-established principle that the reassessment of damages under 46 U.S.C. § 596 rests within the discretion of the Court and depends upon the equities of the particular case. Mystic S.S. Company v. Stromland, 20 F. 2d 342 (4th Cir. 1927), cert. denied 276 U.S. 618, 48 S. Ct. 213, 72 L. Ed. 734; Mavramatis v. United Greek Shipowner's Corporation, 179 F. 2d 310, (1st Cir. 1950); Samad v. The Etive-bank, 134 F. Supp. 530 (E. D. 2a 1950);

Prindes v. The S.S. African Pilgrim, 266 F. 2d 125 (4th Cir. 1959); Spera v. The Argadon, 150 F. Supp. (E.D. 2a. 1957).

Numerous cases have held that where some equity supporting the shipowner's refusal to pay wages existed at the time a seaman's wages became due, which subsequently became inapplicable, penalty wages will be assessed from the time that such equity has disappeared. Thus in Samad v. Etivebank, supra, the Court held that an injured seaman whose physical condition for a thirty day period precluded any efforts to effect payment of wages due him at the time of his injury, was entitled to recover penalty wages beginning thirty days after his wages became due. In Spera v. The Argadon, supra, the Court ruled that, although the initial delay in paying an injured seaman's wages may have been excusable due to a misunderstanding

between the ship's agent and the seaman's attorney, the shipowner's continued delay, after testimony by the seaman that his wages were still owing, was "without sufficient cause," entitling petitioner to penalty wages from the date of his testimony. The Spera Court stated:

> "But when libellant was obviously still asserting his claim for wages at the time of his hearing in open court, there no longer existed any moral justification for prolonging the matter, and the continued action of the shipowner at least constituted a failure not attributable to impossibility of payment." Collie v. Fergusson, 281 U.S. 52, 50 S. Ct. 189, 74 L. Ed. 696, 1930 A.M.C. 408.

The jury in this case did not find that River Lines, Inc.'s initial withholding of wages was justified; it merely found that, because of the equities of the factual situation, petitioner was unable to escape from his

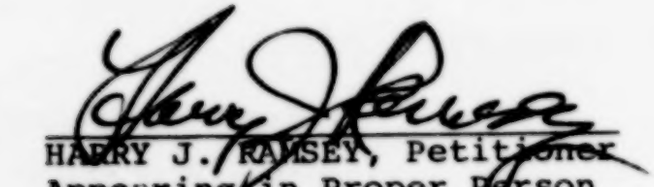
confinement in order to demand his wages within the four day period. The arbitrariness of River Lines, Inc. did not arise within four days of the mutiny. Thus, this case fits squarely into the line of cases upholding judicial discretion in the assessment of penalty wages under 46 U.S.C. §596.

A reversal of the decision of the Court of Appeals would have far-reaching effects and would have a great impact upon masters of American vessels. According to figures compiled by the Superintendent of Documents of the United States Coast Guard, there are approximately 102,000 vessels registered in the United States each of which has a master who would fall within the scope of 46 U.S.C., Section 596, under a

ruling in petitioner's favor [United States Coast Guard, Merchant Vessels of the United States (United States Government Printing Office, 1975)]. In that light, a favorable decision for petitioner would be instrumental in the lives of 102,000 American masters because it would put these people on a parity with other members of the crew and would give them protection from the unscrupulous practices of owners of vessels who have withheld wages for the purpose of coercing a master to relinquish his right to seek legal redress. It is this abuse by shipowners that other members of the crew did not have to contend with. It is now time for the Court to take notice of such practices by shipowners and realize the necessity for rules of fair play between shipowners and masters. Wages were not meant to be

utilized by owners to serve as leverage in persuading a master to abandon a rightful claim. If a master is put on parity with other members of the crew, he could not with impunity be left penniless in a strange land without any means of transportation to the United States, and without maintenance and cure. The number of persons within the class of masters is significant enough to necessitate a judgment for petitioner. The law must accomodate changing times. It is contended that circumstances in shipping have been altered dramatically by technology, and the Court should take note that a judgment for petitioner would effectuate necessary and important changes in the lives of these 102,000 American masters. It has been indicated that the "Seamen's Acts," 46 U.S.C., Section 541 et seq.

were intended by Congress to "improve the surroundings and conditions of American seamen." Ladzinski, supra. Petitioner is appealing to the Court to realize the need to place such a significant class of seamen, that is, masters of vessels, within the protection intended by Congress. The times necessitate this change.



HARRY J. RAMSEY, Petitioner
Appearing in Proper Person
2201 Magazine Street
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(504) 525-0552

A P P E N D I X "A"

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 74-4197

THOMAS P. KEYS a/k/a HARRY J. RAMSEY,

Plaintiff-Appellant,

vs.

M/V MODOCK and THE RIVER LINES, INC.,

Defendants-Appellees,

CHARLES J. PISANO,

Intervenor-Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana

---

(January 31, 1977)

Before BROWN, Chief Judge, AINSWORTH, Circuit Judge, and JAMESON*, District Judge.

PER CURIAM:

In this appeal from the second trial, which rests on the District Court's having granted a motion for a new trial, after jury verdict for appellant, we affirm the District Court's grant of a new trial on the basis of the Court's opinion in 372 F. Supp. 1131.

AFFIRMED.

*Senior District Judge of the District of Montana sitting by designation.

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 74-4197

D. C. Docket No. CA 71-1910 "C"

THOMAS P. KEYES a/k/a HARRY J. RAMSEY,

Plaintiff-Appellant,

versus

M/V MODOCK and THE RIVER LINES, INC.,

Defendants-Appellees,

CHARLES J. PISANO,

Intervenor-Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana

Before BROWN, Chief Judge, AINSWORTH, Circuit Judge, and JAMESON*, District Judge

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

JANUARY 31, 1977

ISSUED AS MANDATE: February 23, 1977

*Senior District Judge of the District of Montana, sitting by designation.

A P P E N D I X "B"

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

HARRY J. RAMSEY, *
*
Plaintiff, *
*
versus *
*
M/V MODOC and RIVER LINES, INC. *
*
Defendants. *
*
* * * * * * * * * * * * * * * * * * *

CIVIL ACTION

NO. 71-1910

SECTION "C"

FILED: February 19, 1974

Benjamin W. Reisch, Clerk

James A. Wysocki, Esq.
Henry Klein, Esq.
Attorneys for Plaintiff

Robert A. Vosbein, Esq.
Robert G. Partridge, Esq.
Attorneys for Defendants

Charles J. Pisano, Esq.
Attorney for Intervenor

RUBIN, District Judge:

The plaintiff, who captained the M/V MODOCK during most of its maiden voyage from New Orleans to San Francisco, sued the vessel and its owner River Lines, Inc. for the injuries and other damages he sustained when the crew of the vessel took command from him midway through the voyage. After three and one-half days of trial, the jury returned a verdict for the plaintiff on both a negligence count and an unseaworthiness count, awarding him $15,000 damages, $2,000 in wages due, and $379 for lost property. The defendant, River Lines, Inc., has now moved for judgment notwithstanding the verdict or, in the alternative, for a new trial on all issues. The plaintiff opposes these motions and asks that judgment for penalty wages be entered under 46 U.S.C. 596 in

accordance with the jury's finding by special interrogatory that the defendant withheld plaintiff's wages without sufficient cause.

PENALTY WAGES

Although it was adverted to at the pre-trial conference, the penalty wages issue was first joined when the parties, belatedly and after the time fixed by the court, submitted their proposed jury instructions. At that time, the parties dispute focussed on Mr. Ramsey's status as a master: was he a master when the wages became due, and if so, could a master recover the statutory penalty? In a conference called during a brief recess, the court indicated that Mr. Ramsey's status was a matter for the court's determination, since there appeared to be no dispute about the material facts; the court also indicated a present disposition to enter a directed verdict against the plaintiff on this issue because of its judgment about Ramsey's status and its reading of the statute. Later, and before the case went to the jury, the court informed counsel that it would, in order to complete the record, instruct the jury on the penalty wage issue and submit to it the question of defendant's conduct in withholding Mr. Ramsey's wages.

As a result, the Court's instructions and the jury's findings on wages read as follows:

> All members of a vessel's crew, including the master, are entitled to recover their wages for the entire voyage if they must leave the ship because they become disabled in its service or, because of the unjustified actions of the owner or his agents, they are unable to continue the voyage. If a member of the crew deserts, however,

he is not entitled to recover these wages. A seaman deserts when he abandons his duty by quitting the ship before the termination of his engagement, without justification and with the intention of not returning.

In addition, the law provides for a penalty, fixed in the law, that an employer must pay a seaman a penalty when it refuses or neglects to make payment without sufficient cause witin twenty-four hours of the end of the voyage. "Without sufficient cause" means arbitrarily or unreasonably or willfully--that is without a reasonable cause.

17. Did Mr. Ramsey at any time during the voyage desert the M/V MODOCK?

YES_____ NO_____, Escaped

If you answered question No. 17 "yes" you need not answer questions 18 - 20.

18. Does the defendant owe any wages to Mr. Ramsey, and if so, how much? And for what dates?

YES X AMOUNT $2,000.00

NO_____ DATES 6/-/70 to 7/-/70

19. Did the defendant fail to pay these wages arbitrarily, unreasonably, or wilfully?

YES X NO_____

The court refused to give defendant's Proposed Charge No. 8: "Further, I charge you that if the ship owner's failure to pay wages to the plaintiff was reasonable initially but later became unreasonable, the plaintiff is not entitled to the double wage penalty." The defendant cited only McCrea v. United States, 1935, 194 U.S. 23, as authority, and an examination of that case shows that this language is taken out of context and then oversimplified.

The court remains convinced that a directed verdict on these facts was

appropriate, since under no construction of them would Mr. Ramsey be entitled to penalty wages. Under the penalty wage statute, 46 U.S.C. 596, only seamen can claim the penalty; Mr. Ramsey was hired as a master, and he remained a master so long as he was performing services for the vessel.

It is true that under the Jones Act, as the Supreme Court first held in Warner v. Goltra, 1934, 293 U.S. 155, 55 S. Ct. 46, masters are considered to be "seamen" and they are therefore entitled to sue under the Act. But in Warner itself, the Court carefully distinguished the Jones Act definitions of master and seaman from the definitions applicable in wage claim cases:

> A goodly number of statutes give a remedy to seamen for wages wrongfully withheld, or define terms of payment that agreement may not vary. In respect of dealing of that order, the maritime law by inveterate tradition has made the ordinary seaman a member of a favored class. He is a "ward of the admiralty," often ignorant and helpless, and so in need of protection against himself as well as others. The master, on the other hand, is able in most instances to drive a bargain for himself, and then when the bargain is made to stand upon his rights. Discrimination may thus be rational in respect of remedies for wages. 55 S. Ct. at 49.

Four years later the Court held expressly that masters' wages were not protected by a related wage-protection statute, 46 U.S.C. 601. The decision turned upon an interpretation of the very definitional section, 46 U.S.C. 713, that gives content to the terms "master" and "seaman" in the penalty wage statute. Blackton v. Gordon, 1938, 303 U.S. 91, 58 S. Ct. 717.

Unless time has undercut their

rationale or Congress has overridden them, these two decisions must govern Mr. Ramsey's claim. He argues quite forcefully and persuasively that both have occurred: masters now are often as powerless to protect their wages as seamen, and Congress recognized as much when it amended Title 46 in 1968 to give masters as well as seamen a lien on the vessel for unpaid wages. The Court has examined the legislative history of this amendment and particularly Senate Report No. 1079, April 5, 1968 To accompany H.R. 13301 ; it seems principally to reflect a concern for the position of the master's wage claim in bankruptcy rather than a broad desire to "equalize" masters' and seamen's wage remedies. Moreover, what Congress chose not to do in expanding the wage protection scheme of Title 46 to include masters is as significant as what it chose to do. Congress was aware of modern conditions and the changed role of a master when it made these revisions, yet it did not extend the penalty wage remedy to masters. In these circumstances, its silence must speak eloquently to this Court.

But, the plaintiff argues, even if a master is not entitled to penalty wages, Mr. Ramsey ceased to be a master when the crew took control of the vessel and he then "reverted" to seaman status. 46 U.S.C. 713 does define a seaman as "any person (apprentices excepted) who shall be employed or engaged to serve in any capacity on board." The difficulty with plaintiff's argument, which rather tortures the statutory definitions, is that

Mr. Ramsey was hired as a master and performed services for the vessel only in that capacity; after the episode off Acapulco, he performed no services whatsoever. It may be that a master who relinguishes command and then serves for the rest of the voyage is entitled to the penalty -- for whatever seaman's wages were withheld -- but Mr. Ramsey did not do that. He was hired and he worked only as a master; if he was not a master, he was not "employed or engaged to serve in any capacity on board."

But even if the court is incorrect on this point, and Mr. Ramsey might recover the penalty -- either because masters may recover it or because Mr. Ramsey became a seaman after the mutiny -- a new trial would be required on this issue. As so often happens when major issues are left obscure until the eve -- and in this case, past the eve -- of trial, the instruction the jury received on the entire penalty wage issue was incorrect, for the issue is substantially more complex than counsel made it appear. The statute upon which Mr. Ramsey's claim for penalty wages rests, 46 U.S.C. 596, reads:

> "The master or owner of any vessel making coasting voyages shall pay to every seaman his wages within two days after the termination of the agreement under which he was shipped, or at the time such seaman is discharged, whichever first happens; and in case of vessels making foreign voyages, or from a port on the Atlantic to a port on the Pacific, or vice versa, within twenty-four hours after the cargo has been discharged, or within four days after the seaman has been discharged, whichever happens first; and in all cases the seaman shall be entitled to be paid at the time of his discharge on account of wages a sum equal to one-third part of

> the balance due him. Every master or owner who refuses or neglects to make payment in the manner hereinbefore mentioned without sufficient cause shall pay to the seaman a sum equal to two days' pay for each and every day during which payment is delayed beyond the respective periods, which sum shall be recoverable as wages in any claim made before the court; but this section shall not apply to masters or owners of any vessel the seamen of which are entitled to share in the profits of the cruise or voyage. This section shall not apply to fishing or whaling vessels or yachts. R.S. 4529: Dec. 21, 1898, c. 28 4, 26, 30 Stat. 756, 764; March 4, 1915, c. 153, 3, 38 Stat. 1164.

To support any recovery, the jury needed decide as a preliminary matter whether Mr. Ramsey's discharge or the ship's discharge of cargo occurred first, in order to determine whether the twenty-four hour or the four day period should apply. Then the jury had to determine that River Lines failure to pay wages within the applicable period was without sufficient cause during that same period; McCrea holds that an owner's behavior, even if it later became arbitrary or unreasonable, does not make him liable for a penalty if sufficient cause to withhold wages was present during the statutory period.

Moreover, there is a substantial body of case law holding that the statutory penalty is not to be automatically computed and assessed by the Court even if the defendant is liable; the court has some discretion over the amount. See, e.g., Southern Cross Steamship Co. v. Firipis, 4 Cir. 1960, 285 F. 2d 651, and cases cited therein; Kontos v. S.S. SOPHIE C., E.D. Pa. 1964, 236 F. Supp. 664. What was once a matter for the court in the exercise of its equitable discretion has presumably become, at least since Fitz-

gerald v. United States Co., 1963, 374 U.S. 16, 83 S. Ct. 1646, a matter for the jury, since the claim for penalty wages is made in a complaint that includes a Jones Act claim. Thus the jury should have been instructed that, even if they found a penalty due, they might toll the period during which it was to run for reasons of equity.

The court's instructions to the jury on the penalty wage issue were thus both incomplete and incorrect. Even if the court incorrectly directed a verdict because of an erroneous reading of the penalty wage statute, the jury's verdict could not support a judgment for penalty wages. The jury simply did not have an opportunity to pass upon the claim and all its elements because it was framed improperly. It may be, as the plaintiff argues, that there was some evidence of unreasonable and arbitrary failure to pay wages within the statutory period, perhaps even enough to support a jury verdict for the plaintiff on this issue; but it is certain that the jury never had an opportunity properly to deliberate, and this court will neither attempt to divine what result this jury would have reached nor decide the issue on its own.

Even if the error in instructions had been corrected at the last minute, and the question correctly put to the jury, a new trial might still be required on this issue. The plaintiff presented a great deal of evidence about conversations and correspondence between the parties and their attorneys at times subsequent to the four day period; plaintiff's attorney examined

Mrs. Ramsey at some length in a particularly emotional scene about her visit to River Lines' office in an attempt to get her husband's wages, a visit she made long after the statutory period had run. Whatever the effect of this evidence on the other issues -- and more remains to be said about that -- and whatever weight it might have been given by a properly instructed jury with respect to tolling the penalty reward, this testimony, admitted without any limiting instruction, infected the jury's consideration of the penalty wage issue. Much if not all of it should have been either excluded or admitted only for a limited purpose, since the only proper issues were (a) whether the defendant had reasonable grounds during the statutory period to refuse payment; and (b) if not, and if the penalty was due, whether it would run for the entire period of time from that time until paid.

Plaintiff's motion for judgment notwithstanding the court's directed verdict on the penalty wage issue is DENIED.

Unseaworthiness

The jury evidently decided that the M/V MODOCK was unseaworthy because, in the language of the instruction, it found that "each crew member or the crew members as a whole either lacked competency or had a wicked disposition, a propensity to evil conduct, or a savage and vicious nature." The evidence upon which they reached this conclusion conflicted.

The plaintiff's story, in essence, was that the crew early in the voyage began to subvert him because they were

unaccustomed to deep water voyages, afraid of sailing too far from shore, and mistrustful of him. When he was off watch and asleep, the crew members on duty would alter the ship's course to bring it closer to shore; the First Mate, Mr. Mastrup, was particularly responsible for these maneuvers, Mr. Ramsey felt. Finally, the plaintiff was forced to arrest Mr. Mastrup and confine him to the forward hold. The crew, however, freed the First Mate and subdued Mr. Ramsey, keeping him confined until the ship docked in Acapulco, where the matter was handed over to the Mexican police. While the ship was in Acapulco, Mr. Ramsey managed to escape, and he then made his way back to the United States.

The only evidence to support Mr. Ramsey's version of these events, and in particular his claim that the nature of the crew made the vessel unseaworthy, is his testimony, the bare fact of the alleged mutiny or removal of Mr. Ramsey from command, and the admitted fact that several members of the crew had never sailed outside of the San Francisco harbor.

The defendant's version is simply that Captain Ramsey, not the crew, was incompetent, and that the takeover by the crew was result of his incompetence and not their disposition. To support its version of the incident, the defendant offered the testimony of four crew members at trial, the depositions of three others, and the testimony of Mr. Beers, River Lines' President.

The jury evidently believed Mr. Ramsey's version of the mutiny,

and their conclusion is of course entitled to great weight. Certainly their decision is supported by enough evidence to withstand a motion for judgment notwithstanding the verdict. Mr. Ramsey's testimony was "substantial evidence," in the sense that, after hearing it, "fair-minded men in the exercise of impartial judgment might reach different conclusions." Boeing v. Shipman, 5 Cir. 1969, 411 F. 2d 365. With his testimony there was not "a complete absence of probative facts to support the conclusion reached" by the jury. Fare v. Southern Railway Co., 5 Cir. 1971, 438 F. 2d 933.

But if the court's function in deciding a motion for judgment notwithstanding the verdict is to look for substantial evidence, its role in considering a motion for a new trial, brought on the grounds that the verdict is against the weight of the evidence, is quite different. As Moore puts it:

> The trial judge, exercising a mature judicial discretion, should view the verdict in the overall setting of the trial; consider the character of the evidence and the complexity or simplicity of the legal principles which the jury was bound to apply to the facts; and abstain from interefering with the verdict unless it is quite clear that the jury has reached a seriously erroneous result. The judge's duty is essentially to see that there is no miscarriage of justice. If convinced that there has been then it is his duty to set the verdict aside; otherwise not. 6A Moore's Federal Practice 59.08 5 at p. 59-161.

An independent evaluation of the evidence in this case has convinced the court that the jury did in fact reach a seriously erroneous result and that the interests of justice would best be served by granting a new trial.

The court found Captain Ramsey's testimony unpersuasive. Evidence as to his background and character introduced by the plaintiffs and never rebutted -- his use of several names and social security numbers, the confusion surrounding whether he ever had a master's license, his lack of actual experience as a master -- tended to cast some doubt on his testimony in general. His inability to plot an accurate course in response to navigational situations put to him while he was on the witness stand because, among other reasons, he failed to take wind-drift into account suggests that it was his incompetence and not the crew's disobedience that put the ship off course. His continuing confusion as to the meaning of standard nautical terms during his testimony reinforces this conclusion. Testimony from the crew about his behavior during the voyage and his own inability to explain conflicts between his testimony at trial and log entries next to his initials also undermine the credibility of hisversion of events. Finally, the intangible factors ofmien and manner during testimony lead the court to doubt Captain Ramsey's story.

The only other evidence tending to indicate that the crew was incompetent, and the vessel thus unseaworthy, was the testimony that most of the crew had not sailed on deep water before, and the fact that the crew did remove Mr. Ramsey from command. While a jury might draw inferences from evidence like this in other cases, the court is convinced that the inference evidently drawn here --

that the crew was incompetent -- is unwarranted.

Mr. Ramsey's testimony contrasted sharply with the testimony of the MODOCK's crew members and Mr. Beers, both in content and indicia of credibility. Counsel for the plaintiff made much of the fact that the crew members' stories coincided, suggesting that this indicated agreement to cover up the real facts. From listening to the testimony and watching these witnesses as they testified, the court is convinced that accurate memories and truthful narration are a far more probable explanation for this "coincidence" than the conspiracy plaintiff's counsel to give the testimony of these crew members the weight it deserved.

It should be noted, too, that all of the irrelevant evidence admitted on the issue of penalty wages, emotional and inflammatory as some of it was, may have warped the jury's consideration of the unseaworthiness issue. This possibility has not influenced the court's independent evaluation of the evidence on unseaworthiness; it may, however, provide some explanation for the jury's verdict.

In light of all the evidence adduced at trial, then, the court finds that the jury's verdict on the issue of unseaworthiness is so seriously in error that a new trial is necessary.

Negligence

In order to recover for negligence in a case like this, the plaintiff must show exactly what he must show to recover for unseaworthiness --

that the crew was incompetent, vicious, or inclined to mutiny. Thus the evidence upon which the jury found the plaintiff negligent was just as weak as the evidence supporting the unseaworthiness verdict, and a new trial must be granted as to this count for the same reasons. In addition, to support a negligence recovery, the plaintiff must show that the defendant knew or should have known of the crew's incompetence or other unfitness for the voyage. See Thompson v. Coastal Oil Co., D.N.J. 1954, 119 F. Supp. 838. The evidence supporting this element of the claim was, if anything, weaker than the evidence going to the crew's nature; at most the plaintiff proved a failure to investigate each crew member individually.

The power of a trial judge to grant a new trial originates in the common law; the Constitution specifically preserved it, and the Federal Rules of Civil Procedure recognize it. Nonetheless, it is not a power that any judge does or should exercise lightly. But in this case, in view of the court's firm conviction that the jury verdict in finding the vessel unseaworthy and the defendant negligent under the evidence presented to it resulted in a miscarriage of justice, the defendant's motion for a new trial as to these issues is GRANTED.

UNITED STATES DISTRICT JUDGE

New Orleans, Louisiana
February 18, 1974

MINUTE ENTRY
MARCH 26, 1974
RUBIN, J.

HARRY J. RAMSEY

versus

M/V MODOC AND RIVER LINES, INC.

CIVIL ACTION

NO. 71-1910

SECTION "C"

FILED: MARCH 26, 1974

CLERK: Benjamin W. Reisch

***

In a previous opinion, the Court granted defendant's motion for a new trial on the issues of negligence and unseaworthiness and refused to set aside its directed verdict on the issue of penalty wages. That opinion did not, however, dispose of two further claims on which the jury found for Mr. Ramsey and as to which the defendant has moved for a new trial: the claim for wages due, and the claim for property left aboard the vesel and not returned.

The principal evidence on which both these claims rested was the plaintiff's own testimony, but other evidence tended to corroborate him. Mr. Ramsey testified as to the voyage and his reasons for leaving the ship in Acapulco; the fact that he made most of the voyage as Captain was not disputed, and the jury could conclude from his testimony and that of other crew members that he was justified in leaving the ship -- or at least that his departure did not amount to desertion. Mr. Ramsey testified also as to the value of the property he left aboard the ship. Although the jury's verdict in this regard did not coincide with his

testimony, there was evidence from other witnesses on this subject, and the jury was entitled to dispute Mr. Ramsey's valuation of his property. In short, if his testimony was credited there was enough evidence before the jury to support its verdict on these issues.

Although the Court did find Mr. Ramsey's evidence on the major issues of unseaworthiness and negligence unbelievable, his testimony on these last two issues was not so inherently incredible that a new trial as to them is warranted. The defendant's motion for a new trial on these issues is, therefore, DENIED.

A F F I D A V I T

State of Louisiana

Parish of Orleans

On this 18th day of May, 1977, before me, the undersigned authority, notary public duly commissioned in and for the Parish of Orleans, State of Louisiana, personally came and appeared Harry J. Ramsey, who, being duly sworn, deposed and stated unto me that he has served a copy of the foregoing petition for writ of certiorari on all counsel of record on this day by depositing same properly addressed in the United States Mail, first-class and postage prepaid.

HARRY J. RAMSEY

Sworn to and subscribed before me this 18th day of May, 1977.

James H. Minge, Notary

In the Supreme Court of the United States

OCTOBER TERM, 1976

NO. 76-1639

HARRY J. RAMSEY,

Petitioner

versus

M/V MODOC and THE RIVER LINES, INC.,

Respondents

CHARLES J. PISANO,

Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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INDEX

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES (Continued)

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IN THE
SUPREME COURT OF THE UNITED STATES

NO. 76 - 1639

HARRY J. RAMSEY,

Petitioner,

versus

M/V MODOC and THE RIVER LINES, INC.,

Respondents,

CHARLES J. PISANO,

Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

RELEVANT FACTS

Petitioner's "Statement of Relevant Facts" glosses over his own conduct and omits several very material facts. The factual background of the case is as follows:

The MODOC was a new tugboat which had been built for River Lines by a shipyard in the New Orleans area. River Lines engaged petitioner Ramsey in San Francisco to act as master and sent him and a crew of River Lines' regular employees to New Orleans to take delivery of the tug and bring it to San Francisco, where it was to be used in towing barges in San Francisco Bay and tributaries.

Upon arrival in New Orleans, petitioner insisted on ship's articles of employment being signed before a Coast Guard Shipping Commissioner. Under the statutes, discussed

hereinafter, articles are required only for foreign voyages, but may be signed for coasting voyages if the master or owner so requests.

The tug then sailed light, without a tow or cargo, for San Francisco. When the tug was off the west coast of Mexico, the petitioner says he "placed the chief mate under arrest" and thereafter the crew "deposed him" and handcuffed him to a fixture in the master's quarters. The facts are not quite as petitioner generalized them to be.

Petitioner's "placing the chief mate under arrest" consisted of hauling the mate out of bed around 6 A.M. at the point of a loaded gun. The mate was not then on watch and had not "disobeyed" any orders at or just prior to this event.

After routing the mate from his bed, petitioner forced him at gun point to proceed to a small unventilated storeroom and locked him in. In these tropical waters the heat and humidity in the storeroom created a very real danger of the mate's death by asphyxiation and/or extreme heat and thirst.

Petitioner then proceeded to the bridge and made threats to other crew members while waving his gun about. They managed to take the gun away from him and confined him to his quarters, after which they freed the mate and put into the nearest port, Acapulco. Confinement of petitioner was then relaxed and he was allowed to "escape." It was some time thereafter before any communication could or did occur between him and the tug owner.

A thorough investigation of the entire chain of events was

conducted both by the Coast Guard and the Federal Bureau of Investigation immediately on arrival of the MODOC in an American port. All crew members were cleared of any suspicion of mutiny, having acted in self-defense.

This suit was ultimately filed on behalf of Mr. Ramsey seeking personal injuries under the Jones Act and General Maritime Law in addition to claims for maintenance and cure, transportation, wages and penalty wages. Trial by jury in November of 1973 resulted in a verdict in favor of Captain Ramsey, finding the vessel unseaworthy and awarding $15,000 for personal injuries, $2,000 in wages and $379 for personal property belonging to Mr. Ramsey. Although the jury found that the failure to pay wages to Mr. Ramsey was arbitrary, the trial judge directed a verdict in favor of River Lines on the penalty wage issue stating that as master of the vessel, he was not entitled to recovery of penalty wages.

Plaintiff then moved for a judgment n.o.v. on the penalty wage issue and defendants moved for a new trial or judgment n.o.v. on the negligence and unseaworthiness issues. Judge Rubin granted River Lines' motion for the new trial and denied Captain Ramsey's motion on the penalty wage issue.

A new trial was held in November of 1974 at which time the jury found the following:

1. River Lines was not negligent;

2. The vessel was not unseaworthy;

3. Plaintiff was not entitled to maintenance and cure;

4. Defendant was not arbiturary for failing to pay maintenance and cure;

5. After Captain Ramsey was relieved as master of the vessel, he did not render any services to the vessel as a seaman that would entitle him to pay;

6. Captain Ramsey was discharged from the vessel on July 16, 1970;

7. Payment by River Lines was possible within four days and that failure to pay wages was arbitrary on their part but the arbitrariness of River Lines did not arise within the four day period following Captain Ramsey's discharge from the vessel.

The trial court entered judgment on the jury's verdict, but no appeal from that judgment was taken. The only record which was lodged in the Fifth Circuit was that of the first trial. After oral argument, the Fifth Circuit in a *per curiam* decision held:

> "In this appeal from the second trial, which rests on the District Court's having granted a motion for a new trial, after jury verdict for appellant, we affirm the District Court's grant of a new trial on the basis of the Court's opinion in 372 F. Supp. 1131."

This opinion, attached as Appendix A to the petition, was not published.

REASONS FOR DENYING WRITS

I.

PROPRIETY OF DISTRICT COURT'S GRANTING A TRIAL MUST BE PASSED ON PRIOR TO CONSIDERATION OF PENALTY WAGE ISSUE RAISED BY PETITIONER

Following the first trial, the District Court granted a new trial and at the second trial, the jury rendered a verdict by answering several special interrogatories pertaining to the penalty wage issue. Petitioner did not appeal from the verdict reached in the second trial and, in fact, the record of proceedings from the second trial was never lodged with the Appellate Court. While the District Court decided as a matter of law in both trials that a master was not entitled to penalty wages, the jury in the second trial decided that penalty wages were not due petitioner whether he was a master or a seaman, and no appeal was taken from this finding at the second trial.

On appeal to the Fifth Circuit Court of Appeals, petitioner attempted to have that court review both the issue of the propriety of the granting of a new trial and the issue of whether a master is entitled to penalty wages, but the Appeals Court properly refused to consider the penalty wage issue because it was not properly before that court and affirmed the District Court's grant of a new trial.

Interestingly, in this application for Writ of Certiorari, petitioner has abandoned his claim that the District Court abused its discretion in granting a new trial and focuses solely on the penalty wage issue. For the reasons stated,

consideration of the penalty wage issue herein is premature until and unless a determination is made on whether the District Court abused its discretion in granting the defendant's motion for a new trial. If the discretion was not abused, all other issues become moot.

The law pertaining to an Appellate Court's review of a Trial Judge's ruling on a motion for a new trial is clear. A motion for a new trial is directed to the sound discretion of the District Judge, and his decision will not be reviewed except when there is an abuse of discretion. *Wood v. Holiday Inns, Inc.*, 508 F. 2d 167 (5th Cir. 1975); *United Broadcasting Co., Inc. v. Armes*, 506 F. 2d 766 (5th Cir. 1975); *Houston Chronicle Publishing Co. v. Coastline Railroad Co.*, 473 F. 2d 357 (5th Cir. 1973); *The United States v. 1160.96 Acres of Land*, 432 F.2d 910 (5th Cir. 1970); *United States v. Bucon Construction Co.*, 430 F.2d 420 (5th Cir. 1970), and cases cited therein.

In the instant case, the District Court's reasons for granting the new trial were reported at 372 F.Supp. 1131, and the basis for that ruling was that:

1. The jury's verdict was so seriously in error that a new trial was necessary to prevent a miscarriage of justice;

2. The jury was charged improperly on the penalty wage issue.

An analysis of the Court's opinion will clearly demonstrate the District Judge's awareness of the sanctity of the jury's verdict, commenting as follows:

". . .The jury failed to give the testimony of these crew members (7 members of the crew of the M/V MODOC who testified either at trial or by deposition) the weight it deserved.

It should be noted, too, that all of the irrelevant evidence admitted on the issue of penalty wages, emotional and inflammatory as some of it was, may have warped the jury's consideration of the unseaworthiness issue. This possibility has not influenced the court's independent evaluation of the evidence on unseaworthiness; it may, however, provide some explanation for the jury's verdict.

. . . .

The power of a trial judge to grant a new trial originates in the common law; the Constitution specifically preserved it, and the Federal Rules of Civil Procedure recognized it. Nonetheless, it is not a power that any judge does or should exercise rightly. But in this case, in view of the court's firm conviction that the jury verdict in finding the vessel unseaworthy and the defendant negligent under the evidence presented to it resulted in a miscarriage of justice, the defendant's motion for a new trial as to these issues is granted."

372 F. Supp. at 1137. Judge Rubin's reasoning on the penalty wage issue was equally clear.

"The court's instructions to the jury on the penalty wage issue were thus both incomplete and incorrect. Even if the court incorrectly directed a verdict because of an erroneous reading of the

penalty wage statute, the jury's verdict could not support a judgment for penalty wages. The jury simply did not have an opportunity to pass upon the claim and all its elements because it was framed improperly. It may be, as the plaintiff argues, that there was some evidence of unreasonable and arbitrary failure to pay wages within the statutory period, perhaps even enough to support a jury verdict for the plaintiff on this issue; but it is certain that the jury never had an opportunity properly to deliberate and this court will neither attempt to divine what results this jury would have reached nor decide the issue on its own.

Even if the error in instructions had been corrected at the last minute, and the question correctly put to the jury, a new trial might still be required on this issue. The plaintiff presented a great deal of evidence about conversations and correspondence between the parties and their attorneys at times subsequent to the four day period; plaintiff's attorney examined Mrs. Ramsey at some length in a particularly emotional scene about her visit to River Lines' office in an attempt to get her husband's wages, a visit she had made long after the statutory period had run. Whatever the effect of this evidence on the other issues--and more remains to be said about that--and whatever the weight it might have been given by a properly instructed jury with respect to tolling the penalty award, this testimony, admitted without any limiting instruction, infected the jury's consideration of the penalty wage issue. Much if not all of it should have been either excluded or admitted only for a limited purpose,

since the only proper issues were (a) whether the defendant had reasonable grounds during the statutory period to refuse payment; and (b) if not, and if the penalty was due, whether it would run for the entire period of time from that time until paid."

372 F. Supp. 1134-1135.

Thus, it is clear that Judge Rubin had a reasonable and rational basis for his decision. Only after a careful review of all the evidence and a thorough study of his instructions to the jury did he decide that the defendants had been prejudiced in the trial of the matter. Because this prejudice resulted in a miscarriage of justice, Judge Rubin in his discretion granted the new trial. Clearly, this was not an abuse of discretion and the District Court's action was affirmed by the Appellate Court. For this reason, it is submitted that this Honorable Court should on this basis deny the Petition for Writ of Certiorari.

II.

PETITIONER HAS NO CAUSE OF ACTION FOR PENALTY WAGES UNDER 46 U.S.C.A. 596

Whatever the evidentiary facts may have been, it is conceded that petitioner was the master of the MODOC on her delivery trip from New Orleans to San Francisco. On those admitted basic facts, without having to decide any disputed factual issues as to exactly what occurred on the voyage or thereafter, it is clear as a matter of law that petitioner has no right or standing to claim penalty wages under 46 U.S.C.A. 596, for two reasons:

1. The vessel and voyage here concerned were such that any application of sec. 596 is precluded by 46 U.S.C.A. 544.

2. A master of a vessel has no right or claim under sec. 596 in any event.

These reasons are briefly discussed in the order above stated.

SECTION 544 OF TITLE 46, U.S.C.A. PRECLUDES THE APPLICATION OF SEC. 596

Section 544 of Title 46, U.S.C.A. (original 1958 edition and 1977 pocket parts) provides that:

> "None of the provisions of sections . . . 591 to 596 . . . shall apply to sail or steam vessels engaged in the coastwise trade, except the coastwise trade between the Atlantic and Pacific Coasts. . ."

Every reported case holds that the scope of sec. 596 is modified and restricted by the provisions of sec. 544, and that sec. 596 does not impliedly repeal sec. 544, which Congress has allowed to remain on the books to this date.

Gardner v. The Danzler, 281 F. 2nd 719 (4th Cir. 1960)

Kowalik v. General Marine Transport Corp., 411 F. Supp. 1325 (S.D.N.Y. 1976), citing *Gardner, Peart* and other decisions.

Peart v. Motor Vessel Bering Explorer, 373 F. Supp. 927 (D. Alaska 1974).

Kelley v. University of Hawaii, 252 F. Supp. 273 (D. Haw. 1966).

Watler v. M/V Sea Lane, 232 F. Supp. 387 (S.D. Fla. 1964).

Beattie v. American Trading & Production Corp., 174 R. Supp. 596 (S.D.N.Y. 1959). (Upholding sec. 544's exclusion of the application of sec. 596 to the coastwise trade except between the Atlantic and Pacific Coasts. In that case the vessel made a round trip between Philadelphia and a Texas port on the Gulf of Mexico).

The fact that articles were signed in New Orleans for this voyage does not make sec. 596 applicable or take the situation out of sec. 544.

Sec. 564 of Title 46, U.S.C.A., *requires* articles to be signed before a Shipping Commissioner for *foreign* voyages and voyages between Atlantic and Pacific Coast ports by vessels of 75 tons and upward. Sec. 563 *allows* articles to be signed for coastwise voyages *if* the owner *or master* so requests, but provides:

> "When a crew is shipped by such Coast Guard official for any American vessel in the coastwise trade. . .such seaman (sic) shall be discharged and receive their wages as provided by *the first clause* of section 596 of this Title. . ."

The "first clause" of sec. 596 reads:

> "The master or owner of any vessel making coasting voyages shall pay to every seaman his wages

> within two days after the termination of the agreement under which he was shipped, or the time such seaman is discharged, whichever first happens;"

Further clauses follow, separated by semicolons. The provision for penalty wages of two days' pay for each day during which payment is delayed without sufficient cause is contained in a separate sentence thereafter.

In *Beattie v. American Trading & Production Corp.* (supra), articles had been signed which were broad enough to allow a foreign voyage. Only voyages between Philadelphia and Texas having been made, sec. 544 was held to exclude the application of sec. 596, although articles had been signed.

This wording of sec. 563 is another recognition by Congress that sec. 544 precludes the application of sec. 596 to coasting voyages other than between the Atlantic and Pacific Coast. If sec. 596 applies to all coastwise or coasting trade vessels, Congress would not have thought it necessary in sec. 563 to incorporate by reference a portion of sec. 596. The reference carefully stops short of incorporating the penalty provision of sec. 596.

A voyage from a Gulf of Mexico port (New Orleans) to a Pacific Coast port (San Francisco) to deliver a newly constructed vessel to her buyer for use in San Francisco Bay and tributaries is not a voyage "in the coastwise trade between the Atlantic and Pacific Coasts" within the meaning of sec. 544. It was not a voyage in "trade" at all, and was not between the specified coasts.

A MASTER HAS NO CLAIM FOR PENALTY WAGES UNDER 46 U.S. CODE 596

Sec. 596 requires "the master or owner" to pay wages to every seaman within specified times, and its second sentence provides that "every master or owner" who fails, without sufficient cause, to pay such wages on time shall pay to the seaman a sum equal to two days pay for each day of delay in payment.

This section thus creates certain rights for "seamen" and imposes a corresponding duty or obligation on "master or owner." In *Forster v. Oro Navigation Co.*, (2 Cir. 1955), 228 F. 2nd 319, at 319-20, the court said:

> "46 U.S.C.A. 596 imposes the duty of payment on 'master or owner'. We think that, if the master fails to pay without sufficient cause, his neglect becomes that of the owner, so that either is liable."

In other words, sec. 596 places a *duty* on the master, along with the owner, in favor of seamen. It is obvious that protection is intended for seamen other than masters *against* owners and *masters*. It may well be entitled to a liberal interpretation in favor of its beneficiaries, but the master is not such a beneficiary; he is ordered to protect the rights of the beneficiaries, and he is ordered to pay wages or pay penalties.

As the court said in petitioner's cited case of *Ladzinski v. Sperling Steamship & Trading Corp.*, 300 F. Supp. 947 (S.D.N.Y. 1969),

> "The primary objective of § 596 is to prevent such coercion by deterring a shipowner *or master* from improperly making a deduction from a *seaman's* wages." (emphasis supplied).

300 F. Supp. at 954.

As Martin Norris says in his authoritative work,

> "The essential spirit and purpose of this statute are to financially punish *the master and owner* for neglectful failure to pay wages. . ."

M. Norris, *The Law of Seamen*, 460 (3rd Ed. 1970)

On its face, then sec. 596 imposes a duty on the master and creates rights in seamen, thus clearly differentiating between master and seamen. It does not create a right to penalty wages in favor of masters.

This plain and obvious meaning of sec. 596 has been recognized by the courts. Every decision on the precise issue of whether a master can claim penalty wages under that section has held that he has no such right or remedy.

The first court to decide this issue was a state court. *Brinkman v. Erie & St. Lawrence Corp.*, 1944 Am. Mar. Cas. 213, 182 Misc. 1045, 46 N.Y.S. 2nd 615 (1944). In a well reasonsed opinion the court reviewed the legislative history of sec. 596 and concluded that Congress did not intend to include "masters" with "seamen" in wage matters such as this one, or to give masters a right to penalty wages.

Brinkman is cited and followed in *Owen v. U.S.* 1945

Am. Mar. Cas. 595 (S.D.N.Y. 1945). The same result was reached, on the authority and reasoning of those two cases, in *Frezados v. M/V San Bernardino Strait*, 1968 Am. Mar. Cas. 159 (M.D. Fla. 1967). In *Kennerson v. Jane R., Inc.*, 274 Supp. 28 (S.D. Tex. 1967), the court, without citing authorities, decided that a master could not claim penalty wages.

In The *Law of Seamen* by Martin J. Norris, the author states:

> "Section 596 places the *master* in *one* position and the *seaman* in *another*. Its effect is to protect the seaman from improper actions by the master. Generally speaking, the master because of his position, his ability to obtain funds and his possession of funds intended for payment of wages and purchase of supplies, is not regarded as requiring that measure of wage protection encompassed by the double wage penalty.
>
> "Recent statutory amendments have given the master wage remedies not previously enjoyed by him, i.e., wage lien and relief from attachments. However, this liberal legislation did *not* include 46 USC §596. *As previously, the master is not entitled to the double wage penalty.*" (emphasis supplied)

1 M. Norris, *The Law of Seamen*, 478 (3rd Ed. 1970).

In 1B *Benedict on Admiralty*, 5-26 (7th Ed., revised), appears the statement, MMMasters are not entitled to a double wage penalty under § 596", citing *Brinkman* and

Kennerson (supra) and Judge Rubin's decision in this case.

Petitioner's argument rests on the general definitions in 46 U.S.C.A. 713. While "seaman" is broadly defined therein, the first portion of that section defines "master" as the person having command of a vessel. Thus even in this section Congress distinguished between "master and seamen."

This distinction between master and seamen has been universally recognized in various wage situations. For example, sec. 600 of Title 46 U.S. Code, invalidated agreements by seamen which would forfeit their lien on the ship or deprive them of any other remedy for wages. Sec. 601 prohibited assignments of seamen's wages and levy of attachment or execution thereon. These sections were universally held not to apply to masters.

In *Blackton v. Gordon*, 303 U.S. 91, (1937), the Supreme Court held that sec. 713 makes a clear distinction between masters and seamen in respect to wages under the wage provisions of Title 46, hence, sec. 601, prohibiting garnishment and execution upon *seamen's* wages, did not prohibit such action against a *master's* wages. Referring to the Act of June 7, 1872, which is the source of the various wage provisions in Title 46, the Supreme Court said:

> "Scrutiny of the act as a whole leads to the view that *in all matters affecting wages seamen were treated as a class which excluded masters;* and this conclusion is required by § 65, [5] which is in part: 'That to avoid doubt in the construction of this act, every person having the command of any ship belonging to any citizen of the United States shall, within the meaning and for the purposes of

> this act, be deemed and taken to be the 'master' of such ship; and that every person (apprentices excepted) who shall be employed or engaged to serve in any capacity on board the same shall be deemed and taken to be a 'seaman' within the meaning and for the purposes of this act; . . .' "
> [5] 17 Stat. at Large 277, Chap. 322, 46 U.S.C.A. 713.

303 U.S. at 92-3; (emphasis added).

Blackton recognized that under other separate statutes, such as the Jones Act (46 U.S.C.A. 688), a master has been held to be entitled to a seaman's remedy for injuries, but holds that such is not the correct interpretation of the wage statutes.

Under maritime case law a seaman had a lien on the ship for wages, but the master did not.

In 1968 Congress amended the statutes to grant additional wage rights to masters. It did not do so by amending sec. 173 or sec. 596, or by enacting a provision that a master shall be classed as a seaman or treated as a seaman under all statutes relating to wages. Instead, it limited its action to specific areas, as follows:

It amended sec. 600 to read that no master *or* seaman may forfeit his lien on the ship or be otherwise deprived of any remedy for wages. It amended sec. 601 to prohibit assignments, attachments and execution against wages of masters *or* seamen. It enacted a new sec.,606, to grant the master a lien for his wages. It continued to show an intent not to have "master" integrated with "seaman" for all purposes by enacting another new section, 607, which provides

that "Sections 603 and 604 of this title shall not apply in any proceeding brought by a master for the enforcement of the lien granted by sec. 606 of this title."

Sections 603 and 604 provide that when a seaman's wages are not paid in ten days from due date, or in case of a dispute as to wages, a judge may summon the master before him to show cause and if no excuse is shown, may order the vessel to be attached by admiralty process and it shall be incumbent on the master to produce the contract and the log book, if required.

In 1968, when Congress amended and enacted as just set forth, all four previous court decisions on the effect of sec. 596 had been that a master has no rights thereunder to penalty wages. Presumably the 1968 legislation was introduced and enacted for the purpose of adding to a master's wage rights and to put him on a par with seamen in at least some wage situations.

Had Congress intended to allow penalty wages to masters, it could easily have amended sec. 596 to provide therefor in clear language. Or, if Congress had intended to abolish all distinctions between master and seamen for wage purposes, it could easily have enacted a new section providing, "In all cases arising under the provisions of this title relating to wages of seamen a master shall have all of the rights and remedies which are granted to seamen in regard to wages."

Or, Congress could have said, "The provisions of sections 596, 600 and 601 of this title shall apply to a master's claim for wages."

Instead, Congress legislated solely with regard to the mas-

ter's lien for wages and his freedom from attachment and execution, saying nothing about sec. 596 or sec. 713. As Judge Rubin said in his opinion rendered in this case:

> "The court has examined the legislative history of this amendment and particularly Senate Report No. 1079, April 5, 1968 (To accompany H.R. 13301); it seems principally to reflect a concern for the position of the master's wage claim in bankruptcy rather than a broad desire to "equalize" masters' and seamen's wage remedies. Moreover, what Congress chose *not* to do in expanding the wage protection scheme of Title 46 to include masters is as significant as what it chose *to* do. Congress was aware of modern conditions and the changed role of a master when it made these revisions, yet it did not extend the penalty wage remedy to masters. In these circumstances, its silence must speak eloquently to this court." (emphasis by the Court).

372 F. Supp. at 1133

As Mr. Norris has said:

> "Recent statutory amendments have given the master wage remedies not previously enjoyed by him, i.e., wage lien and relief from attachments. However, this liberal legislation did not include 46 U.S.C. 596. As previously, the master is not entitled to the double wage penalty."

1 M. Norris, *The Law of Seamen*, 478 (3rd Ed. 1970)

CONCLUSION

Before reaching the penalty wage issue, this Honorable Court must pass on the propriety of the District Court's granting of a new trial. The record is replete with irrefutable evidence that the District Court had a reasonable and rational basis for his decision and did not abuse his discretion in granting the new trial. Since no appeal was taken from the second trial, the other issue is moot.

Further, Judge Rubin's opinion correctly follows the existing law and his ruling is supported by the authorities he cites, viz., sec. 596 does not give a master any right or claim to penalty wages for delay in payment of wages.

Since he held that masters have no rights under sec. 596, Judge Rubin did not need to reach, and therefore did not discuss, the questions whether sec. 596 could have any application to this vessel and this voyage. As our previous discussion shows, sec. 544 of the same Title 46 of the Code precludes the application of sec. 596 to the circumstances of this voyage even if an ordinary seaman had brought suit. This is an entirely separate legal proposition which also supports the result achieved by Judge Rubin.

We have not thought it necessary to discuss petitioner's cited authorities on the broad definition of "seamen" of the need for protecting them, or the fact that a master's position is, as a practical matter, different in modern times from what it was 100 years ago.

These considerations are properly addressed to the Congress, in an effort to obtain additional statutory relief for masters. They have no bearing on the interpretation of sections 544, 596 and 713, all of which were allowed to remain on the books when Congress undertook in 1968 to grant certain specific rights to masters.

We are concerned here solely with the construction and application of sections 544 and 596, which are perfectly clear. We have cited cases which unanimously and uniformly hold that:

a. Sec. 544 precludes the application of sec. 596 in this case, and

b. Sec. 596 gives no rights to a master.

None of the petitioner's cases holds to the contrary on either of those issues and we know of no contrary authority. A discussion of petitioner's authorities is therefore not needed, since they are not in point.

That the Courts below were correct and that the petition for certiorari should be denied is

Respectfully Submitted,

ADAMS AND REESE

BY: _____

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CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari has been served on petitioner Harry J. Ramsey, 2201 Magazine Street, New Orleans, Louisiana 70130, this 29th day of June, 1977.

ROBERT A. VOSBEIN